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WIRETAPPING: THE STATE LAW*

Prior to the invention of the telegraph in 1884, interception of communications was, except for the occasional purloined letter, the work of the eavesdropper. With the advent of the telegraph wire, however, a new form of eavesdropping was devised—wiretapping. Although eavesdropping and wiretapping have much in common, it was not long before state courts distinguished the two and began to treat them differently.[1] Although the eavesdropper could be held for both a crime[2] and a tort,[3] the wiretapper, under the common law, was liable only in tort, namely, for the invasion of the right of privacy.[4]

* This paper is one of a series dealing with the law of wiretapping. The first paper in the series, which was entitled *Wiretapping: The Federal Law*, appeared at 51 J. CRIM. L., C. & P.S. 441 (1960).

[1] "Eavesdropping" was defined under the common law as the "listening under walls or windows or the eaves of a house to hearken after discourse and thereupon frame slanderous and mischievous tales." In re Lanza, 163 N.Y.S.2d 576. 579, 6 Misc.2d 411, 412 (1957); 4 BLACKSTONE, COMMENTARIES 168; State v. Pennington, 40 Tenn. 299, 300, 75 Am.Dec. 771, 772 (1859), citing 2 BISHOP, CRIMINAL LAW 274.

"Wiretapping" apparently was not defined by the common law, but it presumably meant the taking of messages from a wire in order to learn their nature and content. One might, of course, tap a wire without learning the contents of any messages. If this is the case the conversants probably cannot complain, assuming their privacy was not thereby invaded. It seems that the prohibition against "wiretapping" was generally understood to include the prohibition against learning the contents of the messages. Also, it might be noted that if the tap required a touching of the wire, the telephone or telegraph companies conceivably could commence an action of trespass, though no case on this point has been found.

[2] State v. Williams, 2 Tenn. 108 (1808); State v. Pennington, 40 Tenn. 299, 75 Am. Dec. 771 (1859).

[3] McDaniel v. Atlanta Coca Cola Bottling Co., 60 Ga.App. 92, 2 S.E.6d 810 (1939). This was a civil case where earphones were used to overhear and record the conversations of the plaintiff with her husband, doctor, and nurses. The court held that this was eavesdropping and constituted an invasion of the plaintiff's privacy even though plaintiff had given the defendant permission to make any investigation he saw fit into the validity of her claim.

In some criminal cases, however, eavesdropping has not been found to constitute an invasion of the right of privacy. People v. Lawrence, 149 Cal.App.2d 435, 308 P.2d 821 (1957); People v. Malotte, 46 Cal.2d 59, 292 P.2d 517 (1956).

For a discussion of the right of privacy doctrine, see Pavesich v. New England Mutual Life Ins. Co., 122 Ga. 190, 50 S.E. 68 (1905).

[4] Rhodes v. Graham, 238 Ky. 225, 37 S.W.2d 46 (1931). It is noteworthy that the court dealt only with the right of privacy issue, disregarding the plaintiff's contention that the wiretapping constituted a trespass to the telephone line and other property attached thereto which the plaintiff allegedly leased. Apparently no other court has ever determined whether wiretapping is a trespass, probably because, as in Rhodes v. Graham, the case was disposed of as an invasion of the right of privacy.

In accord with the *Rhodes* case is McDaniel v. Atlanta Coca Cola Bottling Co., 60 Ga.App. 92, 2 S.E.2d 810 (1939). Compare, however, Ladrey v. Commission of Licensure to Practice Healing Art, 261 F.2d

The early court decisions dealing with wiretapping were little affected by legislation, but as the communications system swiftly developed throughout the country, the various state legislatures were persuaded by the telegraph and telephone companies to take action regarding the frequent destruction of company property. As a result, the states, with three possible exceptions,[5] enacted legislation prohibiting malicious and mischievous injury to telegraph and telephone lines.[6] Most of the states, in addition, enacted legislation prohibiting the willful and malicious prevention, obstruction, or delay of the transmission of any message over such lines.[7] But the purpose of these statutes was primarily to prevent damage to property and interference with service. Since wiretapping does not generally injure a wire nor interrupt the communication, prosecutions for interceptions of messages under these statutes were rare.[8]

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68 (D.C.Cir. 1958), *cert. denied*, 358 U.S. 920 (1958), where the court, citing Rathbun v. United States, 355 U.S. 107 (1957), held that each party to a telephone conversation takes the risk that the other party may use an extension telephone and allow another to overhear the conversation and that when this takes place there is no actionable violation of privacy interests. Furthermore, the court held that this does not constitute wiretapping nor does it violate the statutes prohibiting interception and divulgence.

For a discussion of the right of privacy doctrine and an enumeration of the states which recognize it, see PROSSER, TORTS §97 (2d ed. 1955).

In those states which have adopted the right of privacy doctrine, only one case has been found which holds that wiretapping does not constitute an invasion of that right. In Commonwealth v. Voci, 185 Pa. Super. 563, 138 A. 2d 232 (1958), the court held that a person engaged in the commission of a crime has no legal right of privacy and, therefore, testimony based on wiretapping is not rendered inadmissible as an invasion of an individual's right of privacy.

[5] Hawaii, Louisiana, and Massachusetts.

[6] ALA. CODE tit. 14, §84 (1958) & ALA. Code tit. 48, §415 (1958); ALASKA COMP. LAWS ANN. §49-5-12 (1949); ARIZ. REV. STAT. ANN. 13-885 (1956); ARK. STAT. ANN. §73-1810 (1957); CAL. PEN. CODE §591; COLO. REV. STAT. ANN. §40-4-17 (1953); CONN. GEN. STAT. REV. §53-124 (1958); DEL. CODE ANN. tit. 11, §754 (1953); FLA. STAT. ANN. §822.10 (Supp. 1959); GA. CODE ANN. §26-8114 (1953) & GA. CODE ANN. §26-3805 (Supp. 1958); Hawaii-none—*but cf.* HAWAII REV. LAWS §296-14 (1955) (tampering with electrical equipment); ILL. REV. STAT. ch. 134, §§14 & 15a (1959); IND. ANN. STAT. §10-4518 (1956); IOWA CODE ANN. §716.7 (1950); KAN. GEN. STAT. ANN. §§17-1907 & 17-1908 (1949); KY. REV. STAT. §433.430 (1958); Louisiana—none; ME. REV. STAT. ANN. ch. 131, §16 (1954); MD. ANN. CODE art. 23, §§323 & 326 (1957); Massachusetts—none; MICH. STAT. ANN. §§28.808 & 28.615(1) (1954); MINN. STAT. ANN. §621.28 (1947); MISS. CODE ANN. §2381 (1957); MO. ANN. STAT. §560.310 (1953); MONT. REV. CODES ANN. §94-3203 (1949); NEB. REV. STAT. §§86-309 & 86-328 (1958); NEV. REV. STAT. §707.310 (1959); N.H. REV. STAT. ANN. §572:3 (1955); N.J. STAT. ANN. §§2A:146-1 & 2A:146-2 (1953); N.M. STAT. ANN. §40-37-5 (1953); N.Y. PEN. §1423; N.C. GEN. STAT. §14-154 (1953); N.D. REV. CODE §8-1008 (1943); OHIO REV. CODE ANN §§4931.25 & 4931.28 (Baldwin 1958); OKLA. STAT. ANN. tit. 21, §§1757 & 1786 (1958); ORE. REV. STAT. §§164.510, 164.630, & 165.540 (1959); PA. STAT. ANN. tit. 18, §4916 (1945); R.I. GEN. LAWS ANN. §11-35-4 (1956); S.C. CODE §58-316 (1952); S.D. CODE §13.4520 (1939); TENN. CODE ANN. §§39-4533 & 65-2117 (1955); TEX. PEN. CODE art. 1334 (1948); UTAH CODE ANN. §76-48-13 (1953); VT. STAT. ANN. tit. 30, §2528 (1958); VA. CODE ANN. §18-214 (1950); WASH. REV. CODE §90.32.020 (1959); W. VA. CODE ANN. §5970 (1955); WIS. STAT. ANN. §134.39 (1957); WYO. COMP. STAT. ANN. §§37-258 & 37-259 (1957).

A typical example of one of these statutes is N.H. REV. STAT. ANN. §572:3 (1955) which provides:

> "If any person shall wilfully, wantonly or maliciously injure, destroy or damage any . . . posts, wires or other materials or fixtures of any . . . public telegraph or telephone line . . . he shall be fined not more than five thousand dollars, or imprisoned not more than ten years, or both."

[7] ALA. CODE tit. 14, §84 (1958); ALASKA COMP. LAWS ANN. §49-5-12 (1949); ARIZ. REV. STAT. ANN. §13-885 (1956); Arkansas—none; California—none; COLO. REV. STAT. ANN. §40-4-17 (1953); Connecticut—none; DEL. CODE ANN. tit. 11, §754 (1953); FLA. STAT. ANN. §822.10 (Supp. 1959); GA. CODE ANN. §26-3805 (Supp. 1958); Hawaii—none; IDAHO CODE ANN. §18-6705 (1948); ILL. REV. STAT. ch. 134, §15a (1959); Indiana—none; Iowa—none; Kansas—none; KY. REV. STAT. §433.430 (1958); Louisiana—none; Maine—none; Maryland—none, Massachusetts—none, MICH. STAT. ANN. §28.808 (1954); Minnesota—none; MISS. CODE ANN. §2381 (1957); Missouri—none; MONT. REV. CODES ANN. §94-3203 (1949); NEB. REV. STAT. §86-328 (1958); NEV. REV. STAT. §§707.310 & 707.320 (1959); New Hampshire—none; N.J. STAT. ANN. §2A:146-2 (1953); N.M. STAT. ANN. §40-37-5 (1953); N.Y. PEN §1423; North Carolina-none; N. D. REV. CODE § 8-1007 (1943); OHIO REV. CODE ANN. §4931,28 (Baldwin 1958); Oklahoma-none; ORE. REV. STAT. §§164.510 &164.630 (1959); Pennsylvania-none; Rhode Island-none; South Carolina-none; S.D. CODE §13.4519 (1939); TENN. CODE ANN. §65-2117 (1955); TEX. PEN. CODE art. 1334 (1948); Utah-none; Vermont-none; VA. CODE ANN. §18-214 (1950); Washington-none; West Virginia-none; WIS. STAT. ANN. §134.39 (1957); WYO. COMP. STAT. ANN. §37-259 (1957).

A typical example of one of these statutes is N. M. STAT. ANN. §40-37-5 (1953) which provides:

> "Any person . . . who wilfully and maliciously prevents, obstructs or delays by any means or contrivance whatsoever, the sending, transmission, conveyance or delivery in this state of any message . . . [shall be guilty of a misdemeanor and will be fined not less than $300.00 nor more than $1,000.00 and/or imprisioned not over 1 year]."

[8] The courts have been somewhat hesitant to bring wiretapping under the malicious mischief statutes since penal statutes have usually been strictly construed.

In State v. Turley, 100 N.H. 267, 125 A.2d 774 (1956), the court made special note of the fact that the statute in New Hampshire prohibiting damage to the property of a public utility does not prohibit wiretap-

Realizing this legislation to be inadequate to cope with the growing problem of wiretapping, the majority of states gradually enacted statutes directed specifically at wiretappers who tapped lines for the purpose of intercepting messages.[9]

Unlike the malicious *mischief statutes* mentioned above,[10] which protect the means of communication, these *wiretapping* statutes prohibit unwarranted intrusions into the privacy of the conversants.[11]

Courts have interpreted these statutes as prohibiting the taking or seizure of a communication *during its transmission by wire.*[12] On the other hand, "the obtaining of what is to be sent before, or at the moment, it leaves the possession of the proposed sender, or after, or at the moment, it comes into the possession of the intended receiver," is presumably always considered "eavesdropping"[13]

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ping. Also see, State v. Nordskog, 76 Wash. 472,136 Pac 694 (1913).

Wiretapping would be punishable only if it resulted incidentally in physical damage or interference with service in the manner prescribed. Southwestern Telegraph & Telephone Co. v. Priest, 31 Civ. App. 345, 72 S.W. 241 (1903); Young v. Young, 56 R.I. 401, 185 Atl. 901 (1936).

[9] ALA. CODE tit. 48, §414 (1958); ALASKA COMP. LAWS ANN. §49-5-12 (1949); Arizona—none; ARK. STAT. ANN. §73-1810 (1957); CAL. PEN. CODE §640; COLO. REV. STAT. ANN. §40-4-17 (1953); CONN. GEN. STAT. REV. §53-140 (1958); DEL. CODE ANN. tit. 11, §757 (Supp. 1958); FLA. STAT. ANN. §822.10 (Supp. 1959); Georgia-none; Hawaii-none; IDAHO CODE ANN. §§18-6704 & 18-6705 (1948); ILL. REV. STAT. ch. 134, §15a (1959) & ILL. REV. STAT. ch. 38, §§206.1 to 206.5 (1959) (eavesdropping includes wiretapping); Indiana—none; IOWA CODE ANN. §716.8 (1950); Kansas—none; KY. REV. STAT. §433.430 (1958); LA. REV. STAT. §14:322 (1950); Maine—none; MD. ANN. CODE art. 35, §§92 & 93 (1957); MASS. ANN. LAWS ch. 272, §99 (Supp. 1959) (eavesdropping includes wiretapping); MICH. STAT. ANN. §28.808 (1954); Minnesota-none; Mississippi-none; Missouri-none; MONT. REV. CODES ANN. §§94-3203 & 94-35-220 (1949); NEB. REV. STAT. §86-328 (1958); NEV. REV. STAT. §707.320 (1959); New Hampshire—none; N.J. STAT. ANN. §2A:146-1 (1953); N.M. STAT. ANN. §40-37-5 (1953); N.Y. PEN. §738 (eavesdropping includes wiretapping); N.C. GEN. STAT. §14-155 (1953); N.D. REV. CODE §8-1007 (1943); OHIO REV. CODE ANN. §4931.28 (Baldwin 1958); OKLA. STAT. ANN. tit. 21, §1757 (1958); ORE. REV. STAT. §165.540 (1959); PA. STAT. ANN. tit. 15, §2443 (1958); R.I. GEN. LAWS ANN. §11-35-12 (1956); South Carolina-none; S.D. CODE §13.4519 (1939); TENN. CODE ANN. §65-2117 (1955); Texas-none; UTAH CODE ANN. §76-48-11 (1953); Vermont—none; VA. CODE ANN. §18-214 (1950); Washington—none; West Virginia—none; WIS. STAT. ANN. §134.39 (1957); WYO. COMP. STAT. ANN. §37-259 (1945).

An example of one of these statutes is UTAH CODE ANN. §76-48-11 (1953) which provides:

> "Every person who wilfully and fraudulently, or clandestinely, taps or makes any unauthorized connection by any means whatever, with any telegraph or telephone wire, line, cable . . . or wilfully and fraudulently, or clandestinely, reads or attempts to read, or learns the contents or meaning of any message, report or communication, by means of any machine, instrument or contrivance, or in any unauthorized manner, while such message, report or communication is in transit or passing over any telegraph or telephone wire, line or cable, or is being sent from or received at any place within this state; . . . is punishable. . . ."

The fifteen states which have not enacted such statutes must, of course, resort to the common law when handling cases involving wiretapping.

Wiretapping is usually made a misdemeanor, though at least three states classify it as a felony: IDAHO CODE ANN. §18-6705 (1948); WYO. COMP. STAT. ANN. §37-259 (1945); N.Y. PEN. §740.

The punishments vary among the statutes with the highest fine being one thousand dollars and the longest jail term, five years. The judge is usually given the discretion to set the sentence within certain prescribed limits.

For a unique statute prohibiting the possession of eavesdropping equipment, see N.Y. PEN. §742.

[10] *Supra* notes 6 & 7.

[11] People v. Broady, 5 N.Y.2d 500, 158 N.E.2d 817 (1959); People v. Appelbaum, 97 N.Y.S.2d 807, 277 App. Div. 43 (1950), *aff'd*, 301 N.Y. 738, 95 N.E.2d 410 (1950).

[12] State v. Behringer, 19 Ariz. 502, 504-505, 172 Pac. 660, 661 (1918); People v. Malotte, 46 Cal.2d 59, 63, 292 P.2d 517, 520 (1956).

[13] People v. Malotte, 46 Cal.2d 59, 64, 292 P.2d 517, 520 (1956) (where the court, citing Goldman v. United States, 316 U.S. 129 (1942), held that there was no "interception" within the meaning of the Federal Communications Act, 48 Stat. 1103 (1934), 47 U.S.C. §605 (1959), and no invasion of privacy in violation of CAL. PEN. CODE §640 where a conversation was recorded, by means of an induction coil, at the moment it reached the intended receiver); State v. Behringer, 19 Ariz. 502, 172 Pac. 660 (1918) (where the placing of a dictograph over the transom of a hotel room in order to overhear messages sent from a telephone in the room was eavesdropping and not an offense within a statute prohibiting wiretapping); State v. Vanderhave, 47 N.J.Super. 483, 136 A.2d 296 (1957) (where the court held that the covert listening to a telephone conversation through an extension telephone or switchboard was eavesdropping and did not come within the compass of the wiretapping statute) (accord, State v. Giardina, 27 N.J. 313, 142 A.2d 609 (1958) (similar facts)).

Also see: Commonwealth v. Smith, 180 Pa. Super. 89, 140 A.2d 347 (1958) (where the court held that there was no interception when a police officer during a raid answered defendant's phone and heard the caller placing bets); Griffith v. State, 111 So.2d 282 (Fla.App. 1959) (where the court held that a police investigator was not wiretapping when he tapped his own telephone and thereby was able to record what the defendant said over the party line) (accord, Williams v. State, 109 So.2d 379 (Fla. App. 1959)) (contra, Tollin v. State, 46 Del. 120, 78 A.2d 810 (1951)).

Whether one who impersonates the intended receiver when answering the telephone is guilty of interception is a question which has not been definitely decided People v. Barnhardt, 66 Cal. App. 2d 714, 153 P.2d 214 (1944).

and in the majority of states is not prohibited by statute.[14]

Many statutes, in addition to forbidding the interception of messages, make punishable the disclosure or divulgence of messages.[15] With one possible exception,[16] it is not necessary under these statutes that divulgence be coupled with interception in order for wiretapping to be punishable. Interception and divulgence are separate crimes.[17]

Although the majority of states today have statutes proscribing or making punishable the interception or divulgence of messages, it is interesting to note that, despite the tremendous amount of wiretapping reportedly done every day,[18] there evidently have been very few wiretap prosecutions and convictions.[19] The scarcity of prosecutions and convictions is not surprising, however, since those prosecuting have very probably been intimately involved themselves with either the act of wiretapping or evidence derived thereby.[20] Then too, until recently, police officers were not prosecuted in some states since it was thought that the wiretap statutes did not apply to them.[21] Furthermore, the act of wiretapping rarely becomes known unless evidence obtained thereby is introduced in court. Another reason for the scarcity of prosecutions

[14] Some states, however, have expanded the scope of their wiretap statutes to include eavesdropping. N.Y. PEN. §738; ILL. ANN. STAT. ch. 38, §§206.1 to 206.5 (Smith-Hurd 1960).

[15] Statutes making the divulgence or disclosure of wiretap information punishable: (asterisk indicates a statute which merely makes divulgence or disclosure by telegraph and telephone company employees punishable) ALA. CODE tit. 48, §§414, 416,* & 417* (1958); ALASKA COMP. LAWS ANN. §49-5-14 (1949); ARIZ. REV. STAT. ANN. §13-887 (1956); ARK STAT. ANN. §73-1812 (1957)*; CAL. PEN. CODE §640; Colorado-none; CONN GEN. STAT. REV. §53-140 (1958)*; DEL. CODE ANN. tit. 11, §§756* & 757 (Supp. 1958); FLA. STAT. ANN. §822.10 (Supp. 1959); Georgia—none; Hawaii-none; IDAHO CODE ANN. §§18-6703* & 18-6706 (1948); ILL. REV. STAT. ch. 134, §8 (1959)* & ILL. REV. STAT. ch. 38, §206.4 (1959); IND. ANN. STAT. §10-4901 (1956)*; Iowa-none; Kansas-none; Kentucky-none; LA. REV. STAT. §14:320 (1950)*; ME. REV. STAT. ANN. ch. 50, 34 (1954)*; MD. ANN. CODE art. 23, §324 (1957)* & MD. ANN. CODE art. 35, §92 (1957); Massachusetts-none; MICH. STAT. ANN. §28.807 (1954)*; MINN. STAT. ANN. §620.65 (1947)*; MISS. CODE ANN. §2382 (1957)*; MO. ANN. STAT. §392.170 (1957)*; MONT. REV. CODES ANN. §94-3321 (1949); Nebraska-none; NEV. REV. STAT. §§200.630 & 200.650 (1959); New Hampshire-none; N.J. STAT. ANN. §2A:146-1 (1953); New Mexico-none; N.Y. PEN. §743*; N.C. GEN. STAT. §14-370 (1953)*; N.D. REV. CODE §8-1009 (1943)*; OHIO REV. CODE ANN. §4931.29 (Baldwin 1958)*; OKLA. STAT. ANN. tit. 21, §1782 (1958); ORE. REV. STAT. §165.540 (1959); PA. STAT. ANN. tit. 15, §2443 (1958) & PA. STAT. ANN. tit. 18, §4688 (1945)*; Rhode Island-none; South Carolina-none; S.D. CODE §§13.4511 & 52.1319* (1939); TENN. CODE ANN. §65-2115 (1955)*; TEX. PEN. CODE art. 335 (1948)*; UTAH CODE ANN. §76-48-6 (1953); Vermont-none; Virginia-none; Washington-none; West Virginia-none; WIS. STAT. ANN. §134.36 & 134.37 (1957)*; WYO. COMP. STAT. ANN. §37-259 (1957)*.

An example of one of these statutes is DEL. CODE ANN. tit. 11, §757 (Supp. 1958) which provides:

> "Whoever reads, takes copy, makes use of, discloses, publishes or testifies concerning any dispatch or message, communication or report intended for another passing over such telegraph or telephone line, wire, or cable, in this state: . . . Shall for each such offense, be fined not less than $500 or imprisoned not more than 1 year, or both. . . ."

Usually disclosure or divulgence is made a misdemeanor. (Although the various statutes use both the terms "disclosure" and "divulgence", no case has been found distinguishing the meanings of the two words.)

Although all the statutes mentioned in this note make disclosure or divulgence punishable, it is not clear whether disclosure or divulgence *in court* is punishable as well as disclosure or divulgence *out of court*. Only a few statutes clearly prohibit testifying as to wiretap information, *e.g.*, DEL. CODE ANN. tit. 11, §757 (Supp. 1958) & N. J. STAT. ANN. §2A:146-1 (1953). These two statutes would even seem to make disclosure or divulgence upon court order punishable, while some of the other statutes only impliedly make disclosure or divulgence upon court order punishable.

Some statutes specifically provide that disclosure or divulgence is not punishable if made pursuant to a court order: (asterisk denotes a statute which only permits disclosure or divulgence by telegraph and telephone employees upon court order) ALA. CODE tit. 48, §417 (1940)*; ARIZ. REV. STAT. ANN. §13-887 (1956); IND. ANN. STAT. §10-4901 (1956)*; LA. REV. STAT. §14:320 (1950)*; MD. ANN. CODE art. 23, §324 (1957)*; MD. ANN. CODE art. 35, §92 (1957); MONT. REV. CODES ANN. §94-3321 (1949); NEV. REV. STAT. §§200.630 & 200.650 (1959); OKLA. STAT. ANN. tit. 21, §1782 (1958) (allows disclosure by anyone upon court order and by police officers at any time).

Some of the statutes make "willful divulgence" punishable, *e.g.*, ARK. STAT. ANN. §73-1812 (1957) & IDAHO CODE ANN. §18-6706 (1948). But what is "willful divulgence?" Do these statutes imply that divulgence upon court order is not punishable?

[16] MD. ANN. CODE art. 35, §92 (1957):

> "The interception *and* divulgence of a private communication by any person not a party thereto is contrary to the public policy of this State." [Emphasis added.]

[17] Some states prohibit both interception *and* divulgence, while others, such Arizona and Colorado, only prohibit one or the other. Compare notes 9 & 15 *supra*.

[18] DASH, SCHWARTZ & KNOWLTON, THE EAVESDROPPERS, 23-34 (1959); Westin, *The Wiretapping Problem: An Analysis and a Legislative Proposal*, 52 COLUM. L. REV. 165, 167–172 (1952). But for a contrary opinion as to the frequency of police wiretapping, see Brown, *The Great Wiretapping Debate and the Crisis in Law Enforcement*, 6 N.Y.L.F. 265, 270–272 (1960).

[19] Rosenzweig, *The Law of Wiretapping*, 33 CORNELL L. Q. 73, 75 (1947). Court decisions on the matter are few in number.

[20] Westin, *The Wiretapping Problem: An Analysis and a Legislative Proposal*, 52 COLUM. L. REV. 165, 167–172 (1952).

[21] For a discussion of this situation, see Savarese, *Eavesdropping and the Law*, 46 A B.A.J. 263, 265 (1960).

for wiretapping may be the notion that it is unjust to prosecute a wiretapper after he has aided the prosecution by securing wiretap evidence which would convict some nefarious criminal.[22] Argument can also be made that since the law allows searches and seizures under certain conditions, as well as police informers and spies, then wiretapping, which is simply another weapon employed to protect society, should also be allowed. As a result, many of the statutes are considered idealistic, but impractical—to be admired, but not necessarily followed.

Although many states' statutes unequivocally prohibit wiretapping,[23] at least one jurisdiction indirectly authorizes law enforcement officers to use wiretapping as a police weapon.[24] Louisiana's statute specifically exempts officers of the law and imposes no express control over wiretapping done by them, though a good faith test may be implied. No consent is required from a court or district attorney. Any law enforcement officer, without a court order, may install a wiretap "for the purpose of obtaining information to detect crime."

Some states, dissatisfied with statutes completely prohibiting wiretapping, and at the same time unwilling to give police officers unbridled discretion in its use, have attempted to strike a balance between society's interest in the capture and conviction of criminals and the individual's right of privacy. Approximately twenty-six states, some perhaps inadvertently,[25] will allow wiretapping if "authorized."[26] Not all of these states' statutes define what is meant by "authorization," but there are those which explain the term in detail.

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[22] There are those of course who consider the protection of one's right of privacy as paramount, even if it means letting a few criminals escape punishment.

[23] Colorado, Delaware, Kentucky, Montana, New Jersey, New Mexico, North Dakota, Rhode Island, and Wisconsin. For specific citations see note 9 *supra*.

[24] LA. REV. STAT. §14:322 (1950):

> "No person shall tap or attach any devices for the purpose of listening in on wires, cables, or property owned and used by any person, for the transmission of intelligence by magnetic telephone or telegraph, without the consent of the owner.
>
> "... This section shall not be construed to prevent officers of the law, while in the actual discharge of their duties, from tapping in on wires or cables for the purpose of obtaining information to detect crime."

Perhaps OKLA. STAT. ANN. tit. 21, §1757 (1958) also authorizes police officers to wiretap, for the statue allows wiretapping by those with "legal authority." The statute does not define what it means by "legal authority," however. Hence, it may mean "legal authority to wiretap," or simply "any kind of legal authority," which would include police officers.

[25] Many statutes merely state that "Every person who ... makes any unauthorized connection ... is punishable. ..." While some of these statutes go on to provide that wiretapping is permissible when authorized by court order or by one or both of the conversants, others fail to spell out any procedure whereby one may obtain the required "authority." See note 26 *infra*.

[26] ALA. CODE tit. 48, 414 (1958) (consent of owner or lessor required); ALASKA COMP. LAWS ANN. §49-5-14 (1949) (consent of owner required); ARK. STAT. ANN. §73-1810 (1957) ("authority" required); CAL. PEN. CODE §§591 & 640 ("unauthorized connections" prohibited); CONN. GEN. STAT. REV. §53-140 (1958) (consent of owner or lessor required; statute only prohibits listening to "messages to which he is not entitled"); FLA. STAT. ANN. §866.10 (Supp. 1959) (consent of owner required); IDAHO CODE ANN. §18-6705 (1948) (prohibits wiretapping done in "any unauthorized manner;" consent of either sender or receiver required); ILL. REV. STAT. ch. 38, §206.1 (1959) (consent of either sender or receiver required); IOWA CODE ANN. §716.8 (1950) (prohibits wiretapping only if "wrongful and unlawful"); LA. REV. STAT. §14.322 (1950) (consent of owner required unless wiretapper is a police officer); MD. ANN. CODE art. 35, §§93 to 96 (1957) (court order or consent of both sender and receiver required); MASS. ANN. LAWS ch. 272, §99 (Supp. 1959) (court order or consent of either sender or receiver required); MICH. STAT. ANN. §68.808 (1954) (prohibits wiretapping done "in any unauthorized manner"); NEB. REV. STAT. §86-328 (1958) (prohibits wiretapping done in any "unauthorized manner"); NEV. REV. STAT. §§200.660 & 200.670 (1959) (court order or consent of both sender and receiver required); N.Y. CODE CRIM. PROC. §§813a & 813b & N.Y. CODE CRIM. PROC. §738 & N. Y. PEN. §739 (court order or consent of either sender or receiver required); N.C. GEN. STAT. §14-155 (1953) (consent of person or corporation operating wire required); OHIO REV. CODE ANN. §4931.28 (Baldwin 1958) (prohibits wiretapping done in an "unauthorized manner"); OKLA. STAT. ANN. tit. 21, §1757 (1958) (wiretapping allowed if done with "legal authority"); ORE. REV. STAT. §§141.720 & 165.540 (1959) (court order or consent of either sender or receiver required); PA. STAT. ANN. tit. 15, §2443 (1958) (consent of both sender and receiver required); S.D. CODE §13.4519 (1939) (wiretapping prohibited if "unauthorized"); TENN. CODE ANN. §65-2117 (1955) (consent of owner required); UTAH CODE ANN. §§76-48-6 & 76-48-11 (1953) (consent of receiver required); VA. CODE ANN. §18-214 (1950) (wiretapping prohibited if done in an "unauthorized manner"); WYO. COMP. STAT. ANN. §37-259 (1957) (wiretapping prohibited if done in an "unauthorized manner").

See United States v. Hill. 149 F. Supp. 83 (S.D. N.Y. 1957), where the court held that each party to a conversation is a sender, as well as a receiver, whose consent is required before the conversation may be divulged by the person intercepting it.

In at least three cases the question has arisen whether a subscriber may tap his own telephone when other parties are using it. In People v. Trieber, 28 Cal.2d 657, 171 P.2d 1 (1946), the court held that a subscriber could not tap his telephone line except with the consent of the telephone company. But in People v. Appelbaum, 97 N.Y.S.2d 807, 277 App.Div. 43, *aff'd*, 301 N.Y. 738, 95 N.E.2d 410 (1950), the court reached an opposite result, holding that a subscriber could tap

Under the Maryland statute, for example, one finds that "authorization" means the obtaining of a court order allowing interception.[27] Such orders are issuable by a judge upon the verified application of the Attorney General, any State's Attorney, or any "duly constituted" police officer. The application must set forth the facts and circumstances upon which the request for a court order is based and must also aver: (1) that there are reasonable grounds to believe that a crime has been committed or is about to be committed; (2) that there are reasonable grounds to believe that evidence will be obtained essential to the solution of, or which may enable the prevention of, such crime; *and* (3) that there are no other means readily available for obtaining such information. The application and any order issued must identify as fully as possible the particular telephone or telegraph line from which information is to be obtained. Once the order is issued, it is effective for a limited period of time, but may be renewed upon expiration.

A similar statute is in effect in New York,[28] but since the case of *Benanti v. United States*,[29] the usefulness of these limited wiretapping statutes has been somewhat clouded. In the *Benanti* case, the United States Supreme Court held that wiretap evidence obtained in compliance with the New York Statute was not admissible in *federal* courts. Furthermore, the Court in effect stated that Congress, through § 605 of the Federal Communications Act,[30] had proscribed all state-authorized forms of wiretapping, and had therefore invalidated all statutes permitting wiretapping.[31] This case has caused some New York judges to cease issuing wiretap orders,[32] but because wiretap evi-

his own telephone line to determine whether it was being used to his detriment. As a result of this case, private investigators were, in many situations, able to tap with fewer restrictions than law officers. New York subsequently amended its statute to prohibit wiretapping by anyone except on court order or upon the consent of the sender or receiver. N.Y. CODE CRIM. PROC. §813a & N.Y. PEN. §738. In neither case did the court seem to concern itself with the conversants' rights of privacy. In a third case, State v. Giardina, 27 N.J. 313, 318-319, 142 A.2d 609, 611 (1958), the court stated:

> "We find it difficult to believe that Congress intended to assure privacy to conspirators brazenly employing a subscriber's facilities to pillage him. Congress could hardly have intended a sanctuary for criminals within the home or plant of their victim. . . .
> . . . [O]ne who uses a subscriber's phone to mulct him takes the risk of detection."

The court held that a business enterprise could, through one of its employees, monitor its switchboard in order to protect itself from suspected unlawful activities. The court further held, however, that the switchboard operator, by listening to the conversations of the conspiring employees, was eavesdropping and did not act in violation of state or federal wiretap statutes.

The wording of some statutes seems to condone wiretapping by a subscriber. See CONN. GEN. STAT. REV. §53-140 (1958).

[27] MD. ANN. CODE art. 35, §94 (1957). A similar statute in Massachusetts was held not to deny due process or equal protection of the laws. Commonwealth v. Publicover, 327 Mass. 303, 98 N.E.2d 633 (1951).

[28] N.Y. CODE CRIM. PROC. §813a.

The New York Statute further provides that a court order permitting "eavesdropping" (which includes "wiretapping" in New York) is not necessary if two conditions are met: (1) that evidence of crime may be thus obtained, and (2) that in order to obtain such evidence time does not permit an application to be made. The statute provides, however, that an order must be sought within eight hours after the eavesdropping has commenced. N.Y. CODE CRIM. PROC. §813b.

[29] 355 U.S. 96 (1958).

[30] 48 Stat. 1103 (1934), 47 U.S.C. §605 (1959).

[31] The Supreme Court in Benanti v. United States, 355 U.S. 96 (1958) at 105 & 106 stated:

> ". . . [K]eeping in mind this comprehensive scheme of interstate regulation and the public policy underlying Section 605 as part of that scheme, we find that Congress, setting out a prohibition in plain terms, did not mean to allow state legislation which would contradict that section and that policy."

[32] Soon after the *Benanti* case, New York Supreme Court Justice Samuel H. Hofstadter, long a critic of warranted wiretapping, with no case before him nevertheless issued an opinion announcing that he could no longer issue wiretap orders. In the Matter of Interception of Telephone Communications, 9 Misc.2d 121, 170 N.Y.S.2d 84 (1958). Justice Hofstadter stated that the United States Supreme Court decision prevented issuance of any order for wiretapping and that this decision was controlling in the states by virtue of the supremacy clause in the federal constitution. For a similar opinion rendered by another New York lower court judge, see Application for Order Permitting Interception of Telephone Communications, 198 N.Y.S.2d 572 (1960).

Though not involving a wiretap order, the recent case of People v. Broady, 5 N.Y.2d 500, 158 N.E.2d 817 (1959), indicates that the New York Court of Appeals takes a somewhat different view. In that case, it was argued on behalf of Broady, a private detective accused of wide-scale wiretapping operations, that Congress, in enacting §605, had completely pre-empted the wiretap field and therefore the New York prohibition against wiretapping offended the supremacy clause of the federal constitution. The Court of Appeals concluded, however, that ". . . [O]ur Penal Law . . . [punishing] the conscious and deliberate tapping of telephones within the State . . . does not offend the supremacy clause of the Federal Constitution." Assuming arguendo that the New York Statute, insofar as it authorized wiretapping, did impinge on the Federal Statute, the Court went on to decide that the scheme of federal regulation was not so pervasive as to make unreasonable the inference that Congress left no room for the states to supplement it.

The only definite thing decided by the *Broady* case is that a state may punish wiretapping. The case does not explicitly decide that court orders for wiretapping

dence is still admissible in state courts, by virtue of the *Schwartz* decision,[33] most of the judges apparently will still issue wiretap orders, even though this conduct is seemingly in conflict with the *Benanti* case.

A problem related to the *legality of the act* of wiretapping is the *use* which can be made *of the evidence* derived thereby. While only about three state supreme courts have held that information obtained by wiretapping is admissible in evidence,[34] only one state supreme court has held that wiretap information is *not* admissible in evidence.[35] Only seven state statutes deal with the evidentiary problem, four providing that wiretap evidence is inadmissible and the other three providing that wiretap evidence is admissible under certain conditions if obtained pursuant to a court order.[36] On the other hand, twenty-four state supreme courts have held that evidence obtained by unconstitutional search and seizure is admissible,[37] while twenty-six state supreme courts have held that unconstitutionally seized evidence is inadmissible.[38]

But whether a state court admits or excludes evidence obtained by an unconstitutional search and seizure, it is not certain that the same rule will be followed in admitting or excluding wiretap evidence. First, it is not certain because the state courts have a right to establish their own evidentiary rules provided no federal law is infringed upon.[39] Second, it is not certain because the United States Supreme Court has held that wiretapping is not a search and seizure within the meaning of the fourth amendment to the federal constitution,[40] and a number of state courts have announced that their search and seizure clauses[41]

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are valid, though it is clear from the lengthy dictum in the opinion that the court was sympathetic toward state regulated wiretapping. As a result, New York courts have continued to issue orders for wiretapping to police officers in substantial numbers.

For a discussion of the *Broady* and *Benanti* cases, see Savarese, *Eavesdropping and the Law*, 46 A.B.A.J. 263 (1960).

[33] Schwartz v. Texas, 344 U.S. 199 (1952).

[34] White v. State, 204 Md. 442, 104 A.2d 810 (1954); Application for Order Permitting Interception of Telephone Communication of Anonymous, 207 Misc. 69, 136 N.Y.S.2d 612 (1955); State v. Steadman, 216 S.C. 579, 59 S.E.2d 168 (1950); Griffith v. State, 111 So.2d 282, 287 (Fla. App. 1959) (dictum).

For the admissibility of evidence procured through eavesdropping, see DeLore v. Smith, 67 Ore. 304, 136 Pac. 13 (1913). Although the court condemned eavesdropping as "despicable," it nevertheless admitted the evidence procured thereby.

[35] Tollin v. State, 46 Del. 120, 78 A.2d 810 (1951). Also see People v. Cahan, 44 Cal.2d 434, 282 P.2d 905 (1955) (evidence procured through eavesdropping excluded).

[36] Inadmissible: ILL. REV. STAT. ch.38, §206.3 (1959); PA. STAT. ANN. tit. 15, §2443 (1958) (supersedes Commonwealth v. Chaitt, 380 Pa. 532, 112 A.2d 379 (1955), which held that wiretap information was admissible in evidence); R.I. GEN. LAWS ANN. §11-35-13 (1956); TEX. PEN. CODE art. 727a (1948) Admissible: MD. ANN. CODE art. 35, §97 (1957); NEV. REV. STAT. §200.680 (1959); ORE. REV. STAT. §41.910 (1959).

It is true that approximately thirty-three states have statutes *making* the divulgence of intercepted messages *punishable*, but it is not clear, except perhaps for Delaware and New Jersey, whether divulgence *in court* is made punishable. See note 15 *supra*. Furthermore, even though a state wiretap statute may seemingly *make divulgence punishable in any situation*, in court or out of court, with or without the consent of the conversants, *e.g.*, CAL. PEN. CODE §640 & FLA. STAT. ANN. §866.50 (Supp. 1959), this does not mean that the statute *prohibits* divulgence in court or *excludes* any wiretap information submitted in evidence. Hence, divulgence may be *punishable*, but the wiretap information divulged may nevertheless be *admitted in evidence*. In Florida, for example, FLA STAT. ANN. §822.10 (Supp. 1959), provides

> "Whoever; . . . taps or connects . . . by wire or any other means whatsoever, to or with any telegraph or telephone line so as to hear . . . any message going over said line . . . or uses, or attempts to use, in any manner or for any purpose, or communicates in any way, any information so obtained; . . . shall be punished . . ."

The statute seems to make divulgence even in court punishable, and yet, in Griffith v. State, 111 So.2d 282 (Fla.App. 1959) at 287, the court said by way of dictum:

> "Our conclusion . . . is that evidence obtained through wiretapping is not inadmissible in evidence in the state courts of Florida because obtained in violation of any general principle of law, any federal or state statutory provision, or the United States Constitution."

[37] Elkins v. United States, 364 U.S. 206,224-232 (1960) (appendix).

[38] *Ibid.*

[39] Schwartz v. Texas, 344 U.S. 199 (1952). See note 54 *infra*.

Also, note the dictum in Griffith v. State, 111 So.2d 282, 287 (Fla. App. 1959), which indicates that Florida would not admit wiretap evidence in court because the divulgence of wiretap evidence violates the Florida constitutional provisions stating that no person shall be compelled to be a witness against himself. Also, see MD. ANN. CODE art. 35, §5 (1957), note 46 *infra*.

[40] Olmstead v. United States, 277 U.S. 438 (1928). In *Olmstead*, the wiretapping was done off the defendant's premises. Whether wiretapping while on the property of the accused (thereby trespassing) constitutes an unreasonable search or seizure within the meaning of the fourth amendment remains an open question.

[41] Every state constitution prohibits unreasonable searches and seizures. See INDEX DIGEST OF STATE CONSTITUTIONS 921 (1959). Most state search and seizure provisions are similar to the fourth amendment to the federal constitution which provides that the people shall be secure in their persons, houses, papers, and effects from unreasonable searches and seizures. The majority of state constitutions also provide, as does the federal constitution, that a search warrant will issue only upon probable cause supported by oath

are to be interpreted in the same manner as the federal clause has been interpreted by the federal courts.[42] Hence, in these states, wiretapping probably would not be considered a search and seizure. Other state courts, however, refuse to be bound by federal interpretations of the fourth amendment when interpreting analogous clauses in their state constitutions.[43] But this does not mean that wiretapping has been or will be construed as constituting any unreasonable search and seizure. Indeed, no state court has so construed its clause. Instead, some have indicated that wiretapping does not fall within the state's constitutional prohibition against unreasonable searches and seizures.[44]

Whether it be for the reason that wiretapping is not a search or seizure, or for some other reason, a few states treat wiretap evidence and unconstitutionally seized evidence quite differently. Thus, for example, in Nevada, unconstitutionally seized evidence is admissible, while wiretap evidence is inadmissible except in certain situations set out in the statute and where wiretapping was authorized by a court order;[45] in Maryland, unconstitutionally seized evidence is admissible, but wiretap evidence is inadmissible unless obtained in conformity with its wiretap statute, and then only for crimes specified in the court order;[46] in Wisconsin, courts apparently can admit evidence obtained through illegal means, which may include wiretapping, but evidence procured by an unconstitutional search or seizure is inadmissible;[47] in Rhode Island, prior to the 1955 statute which provides that unconstitutionally seized evidence shall be inadmissible,[48] evidence obtained by unconstitutional search and seizure was admissible, but wiretap evidence was by statute made inadmissible;[49] in Florida, unconstitutionally seized evidence is inadmissible, but wiretap evidence seems to be admissible.[50]

Neither the federal constitution[51] nor § 605 of the Federal Communications Act[52] *expressly* compels

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or affirmation particularly describing place to be searched and the person or thing to be seized.

[42] "The 4th Amendment to the Constitution of the United States, and Section 22 of the Bill of Rights of the Florida Constitution are the same in meaning and almost identical in wording. For this reason the ruling of the United States Courts on unreasonable searches is generally accepted as authority for a similar ruling in Florida." Houston v. State, 113 So.2d 582, 584-585(Fla. App. 1959). Also see: Thurman v. State, 116 Fla. 426, 156 So. 484 (1934); State v. Hiteshew, 42 Wyo. 147, 292 Pac. 2 (1930); Applegate v. State *ex rel.* Bowling, 158 Ind. 119, 63 N.E. 16 (1902).

[43] "It is true that we have held in the case of Malmin v. State, 30 Ariz. 258, 246 P. 548, that section 8 of article 2 of the Constitution of Arizona is one of the same general effect and purpose as the Fourth Amendment to the Constitution of the United States. We have the right, however, to give such construction to our own constitutional provisions as we think logical and proper, notwithstanding their analogy to the Federal Constitution and the federal decisions based on that Constitution." Turley v. State, 48 Ariz. 61, 70-71, 59 P.2d 312, 316-317 (1936).

Also see Black v. Impelliterri, 201 Misc. 1383, 111 N.Y.S.2d 402 (1952), *aff'd*, 281 App.Div. 671, 117 N.Y.S.2d 686 (1952), *appeal denied*, 118 N.Y.S.2d 732 (1953) and People v. Mayen, 188 Cal. 237, 205 Pac. 435 (1922).

[44] ". . .[T]he statutory immunity from unreasonable searches and seizures relates only to such as are unreasonable in light of common-law traditions." Bruce v. Sibeck, 25 Cal.App.2d 691, 697, 78 P.2d 741, 744 (1938).

Also see: People v. Cahan, 40 Cal.App.2d 891, 297 P.2d 715 (1956); Black v. Impelliterri, 201 Misc. 1383, 111 N.Y.S.2d 402 (1952); N.Y. Const. art. I. §12.

In any event, the state search and seizure provisions could be somewhat inadequate for the purpose of preventing wiretapping even if they did cover wiretapping, since they are only a restriction on the powers of the state and do not prohibit searches and seizures by private persons. See State v. George, 32 Wyo. 223, 231 Pac. 683 (1924) and Imboden v. People, 40 Cal. 142, 90 Pac. 608 (1907).

[45] State v. Chin Gim, 47 Nev. 431, 224 Pac. 798 (1924); NEV. REV. STAT. §200.680 (1959).

[46] Stevens v. State, 202 Md. 117, 95 A.2d 877 (1953); MD. ANN. CODE art. 35, §97 (1957).

But note MD. ANN. CODE art. 35, §5 (1957) which requires the exclusion of unconstitutionally seized evidence in the trial of most *misdemeanors*. The Court in Hitzelberger v. State, 174 Md. 152, 197 Atl. 605 (1938), held that §5 did not prevent the admission of evidence procured through wiretapping since wiretapping was not a search or seizure. Section 5 provides:

"No evidence in the trial of misdemeanors shall be deemed admissible where the same shall have been procured by, through, or in consequence of any illegal search or seizure or of any search or seizure prohibited by the Declaration of Rights of this State; nor shall any evidence in such cases be admissible if procured by, through, or in consequence of a search and seizure, the effect of the admission of which would be to compel one to give evidence against himself in a criminal case."

[47] State *ex rel.* Alford v. Thorson, 202 Wis. 31, 231 N.W. 155 (1930); State v. Kroening, 274 Wis. 266, 79 N.W.2d 810 (1957).

[48] R. I. GEN. LAWS ANN. §9-19-25(1956).

[49] State v. Olynik, 83 R. I. 31, 113 A.2d 123 (1955); R. I. GEN. LAWS ANN. §11-35-13 (1956).

[50] Byrd v. State, 80 So.2d 694 (Fla. 1955); Griffith v. State, 111 So.2d 282, 287 (Fla. App. 1959) (dictum).

[51] Wolf v. Colorado, 338 U.S. 25 (1949).

[52] Schwartz v. Texas, 344 U.S. 199 (1952); People v. Onofrio, 65 Cal.App.2d 715, 151 P.2d 158 (1944); People v. Vertlieb, 22 Cal.2d 193, 137 P.2d 437 (1943;) People v. Kelley, 22 Cal.2d 169, 137 P.2d 1, *appeal dismissed*, 320 U.S. 715 (1943); Leon v. State, 180 Md. 279, 23 A.2d 706, *cert. denied*, Neal v. Maryland. 316

the states to adopt the so-called "federal exclusionary rule" which prohibits federal courts from admitting wiretap information in evidence. In *Schwartz v. Texas*,[53] where the defendant, upon evidence obtained by wiretapping, was convicted in a Texas state court as an accomplice to the crime of robbery, the United States Supreme Court held that § 605 did not prohibit the use of wiretap evidence in a criminal proceeding in a state court.[54]

Nevertheless, the validity of admitting wiretap evidence in state courts is extremely uncertain at the present time. In November, 1959, one Pugach and others were indicted by the State of New York for a number of crimes. About two weeks before the trial was to begin, Pugach brought suit in the United States District Court for the Southern District of New York to enjoin state officials from making use at the state trial of evidence obtained by tapping Pugach's telephone wires in June, 1959, and of evidence obtained by the use of information overheard in the course of the tapping. The complaint alleged that, although the wiretap was obtained pursuant to state court authorization and in accordance with a state statute, its divulgence would constitute a violation of §605 of the Federal Communications Act. Judge Bryan of the District Court refused to grant injunctive relief.[55] Upon motion by Pugach, the United States Court of Appeals for the Second Circuit *stayed* the introduction of the wiretap evidence, pending determination of Pugach's appeal of the decision denying *injunctive* relief.[56]

In another recent case, one O'Rourke and others were on trial in a New York court on an indictment charging them with various crimes. Suit was brought in the United States District Court for the Eastern District of New York by these defendants for the purpose of obtaining an order enjoining the introduction of wiretap evidence in the state court, the allegations of the bill being substantially the same as those in the *Pugach* case. Unlike the *Pugach* situation however, the trial in the *O'Rourke* case was already in progress. Judge Rayfiel of the District Court refused to grant an injunction and distinguished the grant of the stay pending the appeal in the *Pugach* case on the ground that much greater disruption of the state court proceeding would result were the introduction of evidence in a trial already in progress enjoined.[57] Both the United States Court of Appeals for the Second Circuit and Justice Harlan of the United States Supreme Court, as Circuit Justice, declined to stay the introduction of the wiretap evidence pending appeal.[58] Justice Harlan said:

> "Apart from my general practice as Circuit Justice not to disturb, except upon the weightiest considerations, interim determinations of the Court of Appeals in matters pending before it, it would require the most unequivocal showing of a right to immediate federal equitable relief to persuade me to interfere with the conduct of a criminal trial in a state court. In my opinion petitioners' ultimate right to relief is far from clear."[59]

With the use of wiretap evidence having been

U.S. 680 (1942); Rowan v. State, 175 Md. 547, 3 A.2d 753 (1939).

[53] 344 U.S. 199 (1952).

[54] In People v. Dinan, 181 N.Y.S.2d 122, 7 A.D.2d 119 (1958), the New York Court of Appeals, utilizing the *Schwartz* decision, held that it could adopt rules of evidence which are contrary to those adopted by the federal courts so long as there is no violation of the federal constitution. Also, in People v. Grant, 14 Misc.2d 182, 179 N.Y.S.2d 384 (1958), the New York Court specifically held that the *Benanti* case dealt solely with the admissibility of wiretap evidence in a *federal* court and therefore its holding need not prevent wiretap evidence from being admitted in *state* courts. Also see People v. Variano, 5 N.Y.2d 391, 185 N.Y.S.2d 1 (1959).

[55] Pugach v. Sullivan, 180 F. Supp. 66 (S.D. N.Y. 1960).

[56] Pugach v. Dollinger, 275 F.2d 503 (2d Cir. 1960). Also see Graziano v. McMann, 275 F.2d 284 (2d Cir. 1960), where the United States Court of Appeals for the Second Circuit held that the federal wiretapping ban does not entitle a New York prisoner, against whom the state had used wiretap evidence obtained under state law, to federal habeas corpus, basing their decision on Schwartz v. Texas, 344 U.S. 199 (1952). Judge Medina, reluctantly concurring, reiterated his position that Congress pre-empted the field of wiretapping. He further suggested, however, at 286, that regulated wiretapping, and the use of such evidence in state courts:

> "... all despite the ruling of the Supreme Court in United States v. Benanti, 1957, 355 U.S. 96, to the effect that the entire system is illegal and in violation of the Federal Communications Act of 1934 ... and despite the Supremacy Clause, Article VI, Clause 2, U.S. Constitution, may well constitute an invasion of [the prisoner's] constitutional right to due process under the Fourteenth Amendment."

See Commonwealth v. Chaitt, 176 Pa. Super. 318, 107 A.2d 214 (1954), however, where the court said that testimony as to incriminating telephone conversations of the accused overheard through tapping a telephone wire did not constitute a violation of the fourteenth amendment to the federal constitution.

[57] O'Rourke v. Levine, 181 F. Supp. 947 (E.D. N.Y. 1960).

[58] O'Rourke v. Levine, 80 Sup. Ct. 623 (1960).

[59] *Id.* at 623 & 624.

stayed in the *Pugach* case but not in the *O'Rourke* case, both cases came before the United States Court of Appeals for the Second Circuit for determination of whether a federal court should enjoin state officers from divulging wiretap evidence in a state criminal trial. The Court of Appeals, deciding both cases at the same time on April 14, 1960, denied the request for an injunction in a four to one decision and held that wiretap evidence could be used in criminal prosecutions in state courts.[60] The Court stated:

> ". . . [W]e do not think that a federal court should interfere with the prosecution of a state criminal proceeding in order to provide an additional means of vindicating any private rights created by Sec. 605."[61]

The Court also remarked that while it had power to grant equitable relief if it saw fit, in this case the factors weighed more heavily against the use of its power to grant such relief. The Court further vacated the stay previously granted by them to Pugach.

The *O'Rourke* and *Pugach* decisions have been widely interpreted as reaffirming the *Schwartz* decision which gave prosecutors permission to use wiretap evidence in criminal prosecutions in state courts. But because of the *Benanti* case, and the concurring opinion in the *Pugach* case stating that "I am not willing to assume that a New York State trial judge will permit . . . [wiretap] evidence to be admitted over the objection of defense counsel . . . [and i]t is . . . presumptuous to assume that any New York State trial judge will acquiesce to the commission of a crime against the United States in his presence in his courtroom by a witness testifying under oath",[62] the County Court judge in the *O'Rourke* case subsequently refused to admit the wiretap information in evidence even though the Court of Appeals granted *O'Rourke* neither a stay nor an injunction as to the use of wiretap evidence.[63] The judge stated:

> ". . . [T]his Court will not permit any divulging of wiretap evidence in this trial, for to permit otherwise would, in the words of Judge Waterman of the United States Court of Appeals, constitute an 'extraordinary affront' to the Federal Court."

The judge said that the majority opinion and the dissent in the Court of Appeals indicated "that the court is unanimous and unequivocal in its opinion that the introduction of wiretap evidence would constitute a violation of a Federal criminal statute." Thus the federal court has caused at least one judge to exclude wiretap evidence introduced in a state court without resorting to express prohibition of the use of wiretap evidence in state courts, thereby eliminating open conflict between the dual sovereigns.

Meanwhile, by orders dated April 26, 1960, and May 16, 1960, the United States Court of Appeals for the Second Circuit continued Pugach's stay, in the same language as the one it previously vacated, pending application by Pugach to the Supreme Court for certiorari.[64] On June 27, 1960, the United States Supreme Court granted certiorari.[65] Then on July 1, 1960, Pugach submitted a petition to the United States Court of Appeals alleging that his trial was commencing and that the trial judge had denied an application for a preliminary hearing to determine whether the prosecution would use evidence *derived from leads* obtained by wiretaps. The petition requested that the Court of Appeals clarify or enlarge the existing order for stay so that any evidence which resulted *directly* or *indirectly* from information revealed to the police from their violation of §605 would also be enjoined from use in the state trial. The Supreme Court, holding that it had power to grant the relief sought notwithstanding the grant of certiorari by the Supreme Court, modified the order to *enjoin the use or disclosure of any evidence obtained by wiretapping*, as well as the intercepted communications themselves, pending final determination by the United States Supreme Court.[66]

As a result of these *O'Rourke* and *Pugach* decisions, the validity of the future use of wiretap evidence in state courts is as uncertain as the validity of state statutes authorizing limited wiretapping. Perhaps the United States Supreme Court will soon clarify certain aspects of the wiretapping problem in the *Pugach* case.[67] If not, the law of wiretapping will continue to be in a confused state primarily because existing legislation at the state level is badly drafted and outdated. Terms are imprecise, and often inapplicable to modern wiretapping methods. Thus, a statute

[60] Pugach v. Dollinger, 277 F.2d 739 (2d Cir. 1960).
[61] *Id.* at 743.
[62] *Id.* at 745.
[63] New York Times, 4/20/60.
[64] See Pugach v. Dollinger, 280 F.2d 521, 522 (2d Cir. 1960).
[65] Pugach v. Dollinger, 363 U.S. 836 (1960). See 362 U.S. 980 (1960), where the United States Supreme Court denied certiorari to O'Rourke.
[66] Pugach v. Dollinger, 280 F.2d 521 (2d Cir. 1960).
[67] Pugach v. Dollinger, 363 U.S. 836 (1960).

prohibiting "connection" or "interception" does not clearly forbid electronic eavesdropping. Also, whether physical contact with the wire is required in order for the statute to apply remains unclear in most states.[68] There is also the problem of what a statute means by "divulgence" or "willful divulgence."[69] In order to convict someone under these statutes, the courts must often strain the meanings of words beyond their intended use.

Many statutes also fail to spell out whether wiretap evidence divulged in court is excludable or merely made punishable.[70] Only seven statutes have expressly declared whether or not wiretap evidence is admissible in court.[71] As a result, the courts have had to struggle with the problem of whether to admit wiretap information in evidence. Those excluding it were immediately faced with new problems, such as: whether wiretap evidence illegally seized by a private party should come within the rule as well as that illegally seized by public officials;[72] whether the right to object to the use of intercepted conversations should be extended to those persons who were implicated by, but not parties to, the conversation;[73] whether evidence procured by a subscriber by tapping his own lines should be excluded; whether state officers handing over illegally seized wiretap evidence to other state officers for use in other state courts should be prosecuted; whether the exclusionary rule should be limited to prohibiting the government from making affirmative use of wiretap evidence or extended to include a situation in which such evidence is used to impeach the accused's testimony; whether the state should exclude evidence introduced in its courts by federal officers or officers from other states who obtained the wiretap evidence illegally but without state aid.

Further inadequacies of the statutes are indicated by the fact that only the Illinois and Pennsylvania statutes are made specifically applicable to federal officers, and only these same two statutes expressly provide for civil remedies against wiretappers.[74]

These are but a few of the many problems and inadequacies of the present law. It is imperative that the states enact corrective legislation if they expect to adequately cope with the wiretapping problem.[75] Any corrective legislation at the state level should of course be complemented by compatible legislation at the national level. It must be remembered, however, that any corrective legislation must embody the will of the people if it is to be enforceable, and not merely a dead letter, as is the case with much of the present law.

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[68] A few statutes clearly do not require physical contact. See, for example, IDAHO CODE ANN. §18-6704 (1948). Also see United States v. Silverman, 166 F. Supp. 838 (D.C. Cir. 1958), where a federal court held that the federal wiretapping statute, §605 of the Federal Communications Act, applies only to physical interception and does not extent to interception by an electronic instrument if there is no contact between the instrument and the means of communication.

[69] Notes 15 & 36 *supra*.

[70] *Ibid.*

[71] See note 36 *supra*.

[72] See People v. Tarrantino, 45 Cal.2d 590, 290 P.2d 505 (1955).

[73] For cases answering in the negative, see Goldstein v. United States, 316 U.S. 114 (1942) and Manger v. State, 214 Md. 71, 133 A.2d 78 (1957).

[74] ILL. REV. STAT. ch. 38, §§206.1 & 206.3 (1959); PA. STAT. ANN. tit. 15, §2443 (1958).

[75] One state has attempted to deal with the wiretapping problem through an amendment to its constitution providing that:

> "The right of people to be secure against unreasonable interception of telephone and telegraph communications shall not be violated, and ex parte orders or warrants shall issue only upon oath or affirmation that there is reasonable ground to believe that evidence of crime may be thus obtained, and identifying the particular means of communication, and particularly describing person or persons whose communications are to be intercepted and purpose thereof." N.Y. CONST. art. I, §12.